No. 75-1813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NICHOLAS CIVELLA, ANTHONY THOMAS CIVELLA, AND FRANK ANTHONY TOUSA,

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CITATIONS

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Petitioners pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals, filed in this case (Nos. 75-1522, 75-1525, and 75-1528 in the court below) on April 16, 1975, affirming the judgment of guilty by the District Court as to each of the three petitioners.

OPINIONS BELOW

The memorandum opinion of the court of appeals is not yet reported and is printed as Appendix A (pp. 1a-22a) to this petition.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 23a-25a), in each case here sought to be reviewed was filed on April 16, 1975. On May 28, 1976, the Government filed a petition for rehearing in the court of appeals with respect to Barletta and Fontanello, two of petitioners' codefendants whose convictions were reversed. On May 10, 1976, Mr. Justice Blackmun extended the time within which petitioners could file a Petition for Writ of Certiorari to and including June 15, 1976.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. §2518 (1)(b)(iv) requires identification in a wiretap application of all persons the government has probable cause to believe will participate in conversations over the telephone line to be intercepted and whose conversations relate to the illegal activity for which the wiretap application is submitted, and, if so, whether the overheard conversations of those persons "known" but not named in the application should be suppressed.

2. Whether the Government's failure to comply in a timely fashion, without any justification or excuse, with the "service of inventory" requirements of 18 U.S.C. §2518 (8)(d) requires suppression of the wiretap evidence.

3. Whether the incorporation by reference of an affidavit which was never presented to the court can sustain the sufficiency of an application for wiretap authorization in circumstances where another affidavit on similar subject matter was presented to the court concurrently, but in support of a different court order relating to a pen register; and whether such a basic facial deficiency in an application can properly be regarded as simply a clerical error of no consequence in light of the stringent requirements laid down by Congress to control wiretapping?

STATUTE INVOLVED

Section 2518 of 18 U.S.C. provides in pertinent part:

"§2518. Procedure for interception of wire or oral communications.

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted; . . ."

* * * * *

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and . . ."

* * * * *

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

"(a) the identity of the person, if known, whose communications are to be intercepted; . . ."

* * * * *

"(8) . . .

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

"(1) the fact of the entry of the order or the application;

"(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

"(3) the fact that during the period wire or oral communications were or were not intercepted. . . ."

* * * * *

"(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

"(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval . . . ."

STATEMENT OF THE CASE

Petitioners were indicted in the Western District of Missouri, in a five-count indictment arising out of gambling activities, along with Joseph Barletta, Thomas Fontanello, Martin Chess and Philip Saladino.[1] After pretrial motions were heard and determined by Chief District Judge William Becker, the petitioners and Barletta and Fon-

[1] Chess entered a plea of nolo contendere to one count, and Saladino's case was severed and awaits trial.

tanello were tried on Count V only[2] by District Judge William Collinson. Fontanello waived jury trial, and was tried to the court; the others also waived jury trial and were tried by the court on a written stipulation of facts. (R. 1089) All five were convicted.

1. The principal evidence relied on by the government came from a wiretap and a pen register (R. 465; R. 1095) placed pursuant to orders of the district court on a pay telephone at the Northview Social Club[3] in Kansas City, Missouri, during the period between January 8, 1970, and January 17, 1970. (R. 276)

The government's wiretap application to the district judge and the Order authorizing the interceptions named only the petitioner Frank Tousa as the individual committing the offenses which were sought to be established by the wiretap. (App. C, *infra.* p. 28a) The wiretap application recited that the facts showing probable cause were contained in the "attached" affidavit of F.B.I. Special Agent Hellekson. The wiretap order presented to the judge would have authorized the interception of conversations of petitioner Tousa "and unknown others," but the judge struck the words just quoted. (App. D, *infra.* p. 33a) In fact, however, no affidavit of Special Agent Hellekson was ever presented to the court, although an affidavit of Special Agent Ouseley was at the same *ex parte* hearing subsequently presented to the judge in support of the application for a pen register order. (R. 268)

[2] Count V charged a conspiracy in violation of 18 U.S.C. §371 to violate 18 U.S.C. §1084 and 18 U.S.C. §1952.

[3] The FBI had been advised by a confidential informant in 1969 that petitioner Tousa conducted the bookmaking operation out of the Northview Social Club for "Civella." (R. 352) The Club was alleged to be a "well-known hangout for members of the Kansas City 'Outfit' and their associates." (R. 293)

On the last day the wiretap was in operation, January 17, 1970, Special Agent Ouseley filed an affidavit in support of applications for search warrants of the person of petitioner Anthony Civella (R. 344); of the person (R. 309), home (R. 316), and automobile (R. 314) of petitioner Tousa; and of the Northview Social Club (R. 306). Ouseley's affidavit sets forth information from eight confidential informants concerning the gambling activities of all three petitioners and others from January 1969, forward. (R.290-305, 348-363). The affidavit that had been filed in support of the pen register application apparently referred to these same eight informants. (R. 364-374)

These affidavits allege, *inter alia*, that petitioner Nicholas Civella was the boss of the so-called "Outfit" (R. 365), that petitioners Anthony Civella and Tousa were members of the "Outfit" (R. 367), and that petitioner Tousa was running the booking operation for petitioner Nicholas Civella over the telephone at the Northview Social Club (R. 352, 369).

On March 25, 1970, the district judge specifically ordered that a copy of the inventory pursuant to 18 U.S.C. §2518 (8)(d) be served on the three petitioners, but none was served within the 90-day limitation period required by the statute.[4] No explanation for the delay was offered by the government. (App. A, p. 19a)

[4] The order authorizing interception of wire communications was issued by the judge on January 7, 1970, for a period of no longer than ten days. There were no extensions of this order and no ex parte orders of postponement of service of inventory. As the order authorizing interception of wire communication terminated January 17, 1970, service of inventory had to be completed ninety days therefrom — by no later than April 17, 1970. Service was not made on petitioners Anthony and Nicholas Civella until May 1, 1970, and on petitioner Tousa until April 23, 1970. (Tr. 9/6/72, at p. 182). ("Tr." refers to the Court Reporter's transcript filed below.).

No effort was made by the government to serve an inventory notice on Fontanello and Barletta, two other appellants below, until they were indicted in the fall of 1971, almost two years after the overhearings on the wiretap.

Petitioners filed appropriate Motions to Suppress the wiretap evidence because of the government's substantial non-compliance with the statutory requirements, particularly 18 U.S.C. §2518 (1)(b)(iv) and §2518 (8)(d), as well as the basic insufficiency of the application for the wiretap authorization. The motions were denied. (R. 750)

Each of the petitioners was sentenced to imprisonment for 42 months, and also fined $5,000 in the case of petitioners Nicholas and Anthony Civella and $2,000 in the case of petitioner Tousa. Fontanello received the same sentence as petitioner Tousa, and Barletta received a two-year sentence of imprisonment.

2. The five thus convicted appealed to the United States Court of Appeals for the Eighth Circuit, relying mainly on a number of points, *inter alia*, relating to substantial non-compliance by the Government with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211-225, 18 U.S.C. §2510, *et seq.*, in connection with the court-authorized wiretap.

The court of appeals affirmed the convictions of the petitioners, and reversed the convictions of Barletta and Fontanello because of the government's failure to serve on them an inventory of the overheard conversations until after their indictment. (App. A, p. 21a)

In affirming the convictions of petitioners, the court of appeals rejected the contention of petitioners Nicholas and Anthony Civella that the wiretap evidence as to them should have been suppressed for the failure by the government, in applying for a wiretap warrant on a phone believed used by Tousa in the gambling operation, to name the Civellas as persons "known" by the Government to be

"committing the offense and whose communications [were] to be intercepted" as required by 18 U.S.C. §2518 (1)(b)(iv).

The court of appeals agreed that the government did, indeed, "have reasonable cause to believe that at some stage during the wiretap period Tousa would be in communication with the respective Civellas or they with him by means of the target telephone, and that the communications would be intercepted." (App. A, p. 13a)

The court nevertheless held that "if defendants who are not identified originally, although they should have been, are promptly notified in substantial compliance with Section 2518 (8)(d) of the fact and circumstances of the interception of their communications so that they may apply to the issuing judge for an order making available to them the contents of the intercepted communications, the purpose of §2518(1)(b)(iv) and §2518(4)(a) has been achieved. . ." (App. A, p. 17a)

The court recognized that the "question is not without difficulty" (App. A, p. 17a), especially in view of this Court's holding in *United States v. Kahn*, 415 U.S. 143 (1974), and the interpretation placed on that case on an identical point by the Sixth Circuit in *United States v. Donovan*, 513 F.2d 337 (1975), and by the Fourt Circuit in *United States v. Bernstein*, 509 F.2d 996 (1975).

But, the court of appeals, like the divided full court of appeals for the Fifth Circuit, in an 8-6 opinion on the same issue in *United States v. Doolittle*, 507 F.2d 1368 (1975), *adhered to on rehearing en banc*, 518 F.2d 500, was "unwilling to say that a defendant who ought to have been identified initially is automatically entitled to have evidence of his communications suppressed merely because he was not identified originally as a potential interceptee." (App. A, p. 17a).

Compounding the failure to comply with the provisions of Section 2518 (1)(b)(iv) was the fact that the government

also failed to serve the inventory on any of the petitioners within 90 days as required by 18 U.S.C. §2518 (8)(d). The court of appeals viewed the provisions of Section 2518 (8)(d) "to be a substantial and functional part of the Congressional policy of limiting wiretapping," citing *Donovan, supra.* It held, however, that the 5-day delay with respect to petitioner Tousa and the 13-day delay with respect to the petitioners Civella was not significant. (App. A, pp. 20a-21a)

The lengthy delays as to Barletta and Fontanello were held by the court of appeals to be "quite different," observing that "it would be stretching things too far to say that the fact that they received full information . . . after they were indicted in the fall of 1971 amounted to substantial compliance with the statute." (App. A, p. 21a) Accordingly, the wiretap evidence as to Barletta and Fontanello was ordered suppressed.

With respect to petitioners' contention that the application for wiretap authorization which was presented to the district judge was fatally defective because it incorporated by reference the Hellekson affidavit, which was never filed, the court below found this point to be "without merit," (App. A, p. 10a), ruling that the error was merely clerical and did not affect the sufficiency of the application or the order issued thereon. (App. A, p. 11a)

REASONS FOR GRANTING THE WRIT

This case involves a number of important issues concerning the implementation of 18 U.S.C. §2510, *et seq.*, regulating the use of electronic devices to intercept private telephone conversations in the investigation of certain types of criminal offenses. The decision by the court of appeals in refusing to suppress evidence in a situation — (1) where the government failed to name two known prime targets of the investigation in its application for wiretap authority, and (2)

where the government also failed to file the required inventory on those persons and on the one named target within the statutorily prescribed time, and (3) where the government's application adopted by reference, albeit inadvertently, an affidavit that was not filed — calls for review by this Court to give future guidance to the lower courts on the proper sweep and construction of *United States v. Giordano,* 416 U.S. 505, *United States v. Chavez,* 416 U.S. 562 (1974), and *United States v. Kahn, supra,* 415 U.S. 143.

This is especially so because of the conflicting application of those cases by five separate courts of appeals in cases including and similar to this one. This Court has already agreed to review one such case, *United States v. Donovan, supra,* 513 F.2d 337, certiorari granted, No. 75-212.[5] The grant of certiorari in this case would give this Court an additional factual predicate for consideration and application of certain key requirements of the wiretap statute.

1. The decision by the court below in refusing to order the suppression of evidence, where the government clearly failed to set forth in the application for wiretap authorization the identity of the persons "if known" committing the offense and whose communications the government knew would be intercepted, adds to a line of cases on the question which has created a clear conflict within the circuits. That the question is important and should be decided by this Court is demonstrated by its grant of certiorari in *Donovan* which is now pending briefing, argument and decision. A case raising similar issues is *United States v. Bernstein, supra,* 509 F.2d 996, petition for certiorari filed May 27, 1975, No. 74-1486. Still another

[5] The other three circuit court decisions aside from this one and *Donovan,* are *United States v. Bernstein, supra,* 509 F.2d 996 (C.A. 4); *United States v. Doolittle, supra,* 507 F.2d 1368, rehearing, *en banc,* 518 F.2d 500 (C.A. 5); and *United States v. Moore,* 513 F.2d 485 (C.A.D.C.).

case pending in this Court in which the issue is raised is *United States v. Doolittle, supra,* 507 F.2d 1386, adhered to on rehearing *en banc,* 518 F.2d 500, petition for certiorari filed, No. 75-513, October 2, 1975. See also *United States v. Moore,* 513 F.2d 485 (1975), which followed the holding in *Bernstein.*

Moreover, we submit that the decision below on this point is in conflict with this Court's implicit holding in *United States v. Kahn, supra,* 415 U.S. 143. Although the *Kahn* decision was on the negative of the question, the court below recognized that "it can be read as holding . . . that where the government has probable cause to believe that a number of persons are involved in criminal conduct and that their communications . . . are likely to be intercepted . . . it is mandatorily required that all of those persons be identified as prospective interceptees in both the application . . . and in the authorizing order, . . ." (App. A, p. 15a)

Kahn has been so applied in both *Donovan* and *Bernstein,* while the Fifth Circuit, sitting en banc in *Doolittle,* reached a different conclusion, in an 8-6 decision, holding that the failure to so name "known" individuals does not require suppression in the absence of a demonstration of prejudice. The decision in *Doolittle* accords with the view of the court below.

The issue is one intertwined not only with statutory requirements, but also with Constitutional considerations. It is *toto coelo* a different matter for the government to prevail, as in *Kahn,* when the government actually does not know that a particular individual whom the government believes to be involved in the criminal activity is likely to be overheard, from that in this case where the government, as observed by the court of appeals, had probable cause to believe "that at some stage during the wiretap period Tousa would be in communication with the respective Civellas, or they with him by means of the target phone, and that the

communications would be intercepted." (App. A, p. 13a) Moreover, apart from Section 2518, the Fourth Amendment requires a warrant authorizing a search to name the person whose conversations are likely to be intercepted. See *West v. Cabell,* 153 U.S. 78 (1894).

Surely the government cannot urge that it was seeking evidence only against the subordinate in the "Outfit" and not against the individual described as the "boss" of the Outfit in the government's affidavits. (R. 296, 365)

The government obviously was aware it would likely "seize" the conversations of the petitioners Civella as well as those of petitioner Tousa. Since their Fourth Amendment rights were at stake they were required to be named in the authorization order to insure proper notification as required by Section 2518 (8)(d), irrespective of whether the authorization application was approved or denied by the district judge.

Moreover, the failure to name in the wiretap application persons who the government had probable cause to believe were committing the violations under investigation and who would be overheard on the tapped phone was directly related to the "reviewing or approving functions required by Congress." *United States v. Chavez, supra,* 416 U.S. at 575. For example, Section 2518 (1)(e) requires that the application set forth facts of prior applications for or approvals of interceptions involving "any of the same persons, facilities, or places." Circumvention of this requirement, under the Eighth Circuit's decision, would be successfully accomplished by simply not naming in a current application any person with a "history" of prior wiretaps, and the district judge would thereby effectively be deprived of one of the considerations Congress intended he should weigh. See *United States v. Bernstein, supra,* 509 F.2d at 1000.

The question is certainly substantial in the implementation of the Congressionally mandated procedures

established by Congress in enacting Title III. In view of the clear split among five Circuit Courts of Appeals, and the inconsistent application of this Court's holding in *Kahn*, the question, we submit, should be reviewed and resolved by this Court.

2. Another and further question that warrants the consideration of this Court is that relating to the effect which should be given to the government's failure, without any justification or excuse, to follow the statutory requirements with respect to timely notification to the parties whose conversations have been overheard.

The statute requires an inventory to be served "*within a reasonable time but not later than 90 days*. . . after the termination of the period of an order on the persons named in the order . . . and such other parties to the intercepted communications as the judge may determine in his discretion that is in the interest of justice." 18 U.S.C. §2518 (8)(d). (Emphasis supplied)

The district judge specifically ordered inventories served on petitioner Tousa, who was named in the wiretap order, and on petitioners Nicholas and Anthony Civella, who were not so named but were overheard. But inventories were not served within the ninety-day time limit set forth in the statute. The court below ruled there was "substantial" compliance with the statute and that the petitioners have not shown they were prejudiced thereby.

Such a holding, however, turns the carefully drafted statutory scheme on its head and nullifies its basic thrust. This is no ordinary regulatory statute. It was drafted by Congress in light of the teachings of this Court in *Berger v. New York*, 388 U.S. 41 (1967), that an extraordinary investigative weapon such as wiretapping must have carefully drawn substantive and procedural safeguards in order to satisfy the Constitutional requirements of the Fourth Amendment.

We, of course, do not contend that every technical violation of the statutory requirements must lead to suppression. This Court, in *United States v. Chavez, supra,* 416 U.S. at 575, has laid down the test that a wiretap authorization is unlawful if violation of a statutory provision affects "the fulfillment of any of the reviewing or approval functions required by Congress."

But as was held in *United States v. Donovan, supra,* at pp. 343-344, which is also under review by this Court, the inventory notice provision "plays a central role in the statutory scheme" and suppression is required if there is a breach of such a Title III provision, citing *United States v. Giordano, supra,* 416 U.S. 505.

The government, in its petition for certiorari (at p. 13) in *Donovan,* No. 75-212, argues that *Donovan* in this respect "conflicts with decisions of the United States Court of Appeals for the Third, Eighth and Ninth Circuits."[6]

The pertinent Ninth Circuit case *United States v. Chun,* 503 F.2d 533, at 542 (1974), held that "the inventory notice provision is a central or at least a functional safeguard in the statutory scheme. Therefore, a violation thereof *may* require suppression under *Giordano.*" The court then remanded for further proceedings on "whether the underlying statutory purpose" has been satisfied in spite of "appellees' failure to receive such formal notice." *(Id.* at p. 542)

On remand of *Chun,* the district court concluded after a hearing that no prejudice was shown and there was, therefore, no violation of the Fourth Amendment rights.

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[6] *United States v. Iannelli,* 477 F.2d 999, 1003 (C.A. 3, 1973), *affirmed on other grounds,* 420 U.S. 770 (1975); *United States v. Wolk,* 466 F.2d 1143, 1145 (C.A. 8, 1972). *United States v. Chun,* 503 F.2d 533 (C.A. 9, 1974), is also cited.

But the motions to suppress on statutory grounds were granted because suppression "must follow when it is shown that a statutory requirement which was intended to play a central role in the statutory scheme has been ignored." 386 F. Supp. 91, 96 (D. Hawaii).

We agree with the contention of the government in its *Donovan* petition that the issue of the effect of failure to follow the inventory requirements of Section 2518 (8)(d) should be resolved by this Court.

And we submit in this regard, that the circumstances here present are more egregious than in either *Donovan* or *Chun*, because here the district judge had ordered the service of inventory on the petitioners Civella on the determination that such service was "in the interest of justice" as set forth in the statute.

Moreover, the decision of the court of appeals in this case constitutes a judicial revision of the Congressionally enacted Section 2518 (8)(d). The court holds that a 5- or 13-day delay is a substantial compliance, in the absence of prejudice. On the other hand, the court held the approximate 18-month delay with respect to Barletta and Fontanello to be too long and to require suppression, despite the absence of a showing of prejudice. Presumably, then, there is some time period which the court below would regard as beyond "substantial compliance."

We submit, however, that the outer perimeter with respect to time has been set by the statute. Section 2518 (8)(d) does not speak generally of service within 90 days. Its command is "[w]ithin a reasonable time, *but not later than* 90 days," an inventory shall be served. The government's failure to meet this outside time frame should be a bar to its using the wiretap evidence in a criminal case against any

person who was not notified within the time frame specified by the Act.[7]

3. A third point relates not only to the government's failure to adhere to the stringent requirements of the Title III procedures, but also to the most fundamental requirements of the Fourth Amendment and Rule 41(c) of the Federal Rules of Criminal Procedure.

The government attorney's sworn application for wiretap authorization in this case recites (App. C, p. 29a):

> "4. I have discussed all the circumstances of these offenses with Special Agent Spencer Hellekson of the Federal Bureau of Investigation, who has conducted the investigation herein and I have examined the affidavit of Special Agent Spencer Hellekson (attached to this application as Exhibit B, and incorporated by reference herein) which alleges the facts therein in order to show that: . . ."

In point of fact, however, no affidavit by Hellekson was ever presented. A Special Agent Ouseley was present at the *ex parte* hearing on the wiretap application and he did subscribe to an affidavit captioned, "In the Matter of the Application of the United States for an Order Authorizing the Interception of Wire Communications." But this affidavit was never attached to the wiretap Application, and indeed appears to have been executed in support of an application for a pen register *after* the district judge had already signed the wiretap Order.

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[7] At the very least, in order to prevail on a claim of "substantial compliance" and "lack of prejudice" the government in such circumstances should be required to show a "justifiable excuse" for the delay. Even that probably would not cure the defect in failing to follow a "central requirement" as to notification, but certainly no less should suffice.

The partial transcript of that hearing reads as follows:

"The Court: I see. Then — all right. Now, we will attach Mr. Wilson's authorization to that (indicating). What is today, the 7th?

"Mr. Hamilton: Yes, sir.

"The Court: Now, I will make a direct finding in the record that the papers filed with me, the affidavit, the oral statements of Mr. Martin, I find to be sufficient under the — I don't know the sections numbers — commonly called the crime — what's that act?

"Mr. Martin: Safe streets — the omnibus crime.

"Mr. Hamilton: Omnibus and safe streets act of 1968.

"The Court: — under the provisions of that [R. 266] act they authorized an order setting up this very limited telephone surveillance by wiretap.

"Now, am I correct in understanding that the order for the pen register which, as I understand from your explanation, is a device that will reveal from the dialing of the phone what number is being called, is that right, is that what it does?

"Mr. Martin: It is, your Honor, it requires probable cause and it definitely is not an interception under — the legislative record will show that the use of a pen register is not an interception under the omnibus crime bill, which we are discussing at this time. It is not an interception, therefore does not fall within the proscriptions and limitations of this act.

"The Court: All right. Mr. Ouseley, would you come forward and sign this?

(Mr. Ouseley signed the application.)

"The Court: Now, I haven't had an opportunity — raise your right hand. Do you solemnly swear the facts stated in this application are true? [R. 267)

"Mr. Ouseley: I do.

The Court: All right, I haven't had an opportunity to read this over, I will just read it over. I may have some questions about it.

"Well, I don't believe there are any questions I need to ask Mr. Ouseley. This affidavit is very detailed and very complete and doesn't leave any unanswered questions in my mind, and I find that it clearly establishes probable cause for the issuance of this order requested.

"So the order authorizing the interception of wire communication — I mean authorizing the use of a pen register —

"Mr. Hamilton: We will also need the order for the interception.

"The Court: I have already signed it. [R. 268]."[8]

It was the proposed affidavit by Hellekson that was processed through the Department of Justice and reviewed by the Attorney General in approving the submission to the court of the application. But the government claims the

[8] That Special Agent Ouseley's affidavit was to be used for only obtaining the Order Authorizing Use of a Pen Register is further apparent from the fact that the Order Authorizing Use of a Pen Register states at the outset it is based upon "full consideration having been given to the matters set forth" in William N. Ouseley's affidavit (Def. Exh. 23), whereas the Order Authorizing Interception of Wire Communications recites that it is founded upon "full consideration having been given to the matters set forth" in David H. Martin's Application (Def. Exh. 22). Since Mr. Ouseley's affidavit is nowhere mentioned in David Martin's Application (Def. Exh. 21), of necessity, Mr. Ouseley's affidavit was never considered for the purpose of issuing the interception order.

Ouseley affidavit was identical to the Hellekson draft which was finally approved.

Even though the government's application erroneously stated that it was supported by Hellekson's affidavit, which it was not, both the trial court and the court of appeals regarded the mistake as "merely clerical," since it did not influence Judge Collinson in granting the wiretap authorization and it did not prejudice the defendants. (App. A, pp. 10a-11a)

Here again, the court below, incorrectly in our view, applied the test of lack of prejudice. Lack of prejudice has nothing to do with the fundamental Constitutional and other legal requirements for a valid search warrant. See, e.g., *Baysden v. U.S.*, 271 F.2d 325 (C.A. 4, 1959).

It appears from the record that the draft Hellekson affidavit was finally approved as sufficient by the Attorney General. Another agent, Ouseley, was instead designated to execute that form in support of the application, but through oversight, that change in personnel was not reflected in the government attorney's affidavit applying for the Order. If at that point the Ouseley affidavit had been executed and attached to and made a part of the application, it may be that the court of appeals' holding of clerical mistake would be sound. See *United States v. McCoy*, 478 F.2d 176 (C.A. 10, 1973), cert. den., 414 U.S. 828. To the *contra*, see *United States v. Carignan*, 286 F. Supp. 284 (D. Mass., 1967), relying on *United States ex rel Pugh v. Pate*, 401 F.2d 6 (C.A. 7, 1968), and *King v. United States*, 282 F.2d 398 (C.A. 4, 1960).

But no affidavit of any Special Agent was attached to the Application, and it appears clearly from the transcript that no Special Agent affidavit had ever been sworn to when the Order authorizing the wiretap was signed.

Such a basic defect in the most central part of the statutory and Constitutional requirements merits review by

this Court, particularly in view of the other defects in the procedures followed by the government in the implementation of Title III in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-1522
United States of America,
Appellee,
v.
Nicholas Civella,
Appellant.

No. 75-1525
United States of America,
Appellee,
v.
Anthony Thomas Civella,
Appellant.

No. 75-1528
United States of America,
Appellee,
v.
Frank Anthony Tousa,
Appellant.

No. 75-1530
United States of America,
Appellee,
v.
Joseph Barletta,
Appellant.

No. 75-1532
United States of America,
Appellee,
v.
Thomas Fontanello,
Appellant.

Appeals from the United States District Court for the Western District of Missouri.

Submitted: December 11, 1975
Filed: April 16, 1976

Before LAY, BRIGHT and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

These five consolidated appeals come to us from the United States District Court for the Western District of Missouri. The defendants, Nicholas Civella, his nephew, Anthony Thomas Civella, Frank Anthony Tousa, Joseph Barletta and Thomas Fontanello, along with Martin Chess and Phillip Saladino, were jointly charged in the fifth court of a five count indictment with having unlawfully conspired in violation of 18 U.S.C. § 371 to violate the provisions of 18 U.S.C § 1084 and 18 U.S.C. § 1952.[1] The charge against the Civellas, Tousa and Barletta was submitted to District Judge William R. Collinson on a stipulation of facts entered into subject to defense contentions put forward in

[1] Section 1084(a) makes it an offense for any person who is engaged in the business of betting or wagering knowingly to use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers. Section 1084(b) provides that nothing in the section is to be construed as prohibiting the interstate or foreign transmission of news reports concerning sporting events or information dealing with betting or wagering on a sporting event from a state in which betting or wagering on the event in question is legal to a state in which betting or wagering on the event is also legal.

Section 1952 makes it a federal crime for any person to travel in interstate commerce or to use any facility of interstate commerce, including the mail, to distribute the proceeds of any unlawful activity or to otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of any unlawful activity.

numerous pretrial motions which were denied by the district court.[2] Fontanello joined in certain paragraphs of the stipulation but refused to join in others; his case was tried to Judge Collinson without a jury. Martin Chess entered a plea of nolo contendere; the defendant Saladino was granted a continuance. All of the appealing defendants were found guilty; all were sentenced to imprisonment, and all but Barletta were fined.

The appeals were consolidated and were briefed and argued together. The record in the case is most voluminous.

In the last analysis, the government's case against the respective defendants is based on the results of a wiretap of a pay telephone located in the Northside Social Club, also known as The Trap, located at 1048 East Fifth Street in Kansas City, Missouri. The local number of the telephone is or was 421-8727. The building in which The Trap is or was located is owned by the defendant, Nicholas Civella, and it appears that the establishment was operated at relevant times by the defendant, Tousa.

The wiretap interception was authorized by Judge Collinson on January 7, 1970 on the application of David H. Martin, a Special Attorney of the Department of Justice assigned to the Kansas City "strike force."[3] The authorizing order was entered pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, hereinafter called the Act.

The interception was authorized for a period of ten days beginning on January 8, 1970. The last interception was effected on January 16 or January 17. On the date last mentioned Judge Collinson issued a warrant commanding the search of certain premises and the seizure of certain

[2] Practically all of the motions were passed upon by Chief District Judge William H. Becker.

[3] See 28 U.S.C. § 515.

materials; the warrant was executed and some seizures of gambling records and paraphernalia took place.

The validity of the conviction of the defendants hinges upon the validity of the authorizing order and upon whether after the interception was terminated there was adequate compliance with the inventory provisions of 18 U.S.C. § 2518(8)(d). All of the defendants contend for reversal that the Act was substantially violated, and that the results of the wiretap and evidence obtained as a result of the tap should have been suppressed as provided by § 2515 and § 2518(10)(a).

In addition, the defendants contend jointly that Title III of the Act is unconstitutional, and that the proceedings against them were invalidated by the participation therein of strike force attorneys, including Special Attorney Martin.

The defendant Fontanello contends separately that in any event the evidence against him, including the results of the wiretap, was insufficient to sustain his conviction.

Apart from the ultimate fact of guilt or innocence, the background facts of the case are not in serious dispute.

Nicholas Civella is well known to both state and federal law enforcement officers. He is at least supposed to be the leader or one of the leaders of organized crime in the Kansas City area. His activities in the field of illegal gambling and those of his associates were the subject of intensive FBI investigation for months before wiretap authorization was sought from the district court. The investigation produced a great deal of information from confidential informants who for obvious reasons would have been unwilling to testify in court to what they told the FBI.

In view of the stipulation that has been mentioned, there is no question that during the period defined in the indictment, which period extended from about July 1, 1968 to

about January 17, 1970, Nicholas Civella and the other defendants, with the possible exception of Fontanello, were engaged in a conspiracy to violate 18 U.S.C. §§ 1084 and 1952 and that overt acts in furtherance of the conspiracy was committed.

The object of the conspiracy was to engage on a large scale in bookmaking gambling prohibited by Missouri law, V.A.M.S. 563.350 and 563.360. Wagers were accepted on such sporting events as football and basketball games, and at times wagers that had been accepted were "laid off" with other gamblers to protect the conspirators from loss. Like all large bookmaking operations, this one involved the extensive use of telephone communications including both long distance and local and interstate and intrastate calls.

The FBI's investigation led it to conclude that the bookmaking operation was being conducted principally by the defendants Anthony Civella and Tousa for their own benefit and for the benefit of Nicholas Civella. It was also concluded that The Trap was a principal center of the operation, and that the pay telephone that has been identified was being used at least by Tousa in the carrying on of the business of the operation.

On the basis of the FBI investigation and after the results of that investigation had been considered in the Department of Justice, Special Attorney Martin was authorized to apply to the district court for a wiretap order as provided by § 2518(1). He made the application, and it was granted by Judge Collinson after an ex parte hearing. The authority listed no one but Tousa as a prospective interceptee, and the authority was limited to times during which Tousa was observed to be present physically on the premises of The Trap, and no conversation was to be monitored or recorded unless the FBI agents conducting the tap were able to establish by voice recognition the fact that Tousa was one of the parties to the conversation.

After the wiretap was terminated, Judge Collinson directed that inventories be served on Tousa, the Civellas, and on two other individuals who were not indicted. While the inventories should have been served not later than ninety days after the expiration of the authorized period of the interception, they were not in fact served within that period of time, although they were served soon after that period expired. No order was ever entered directing service of inventories on Barletta or Fontanello, and neither was ever served with an inventory.

Three indictments have been returned in the case. The first indictment, returned in October, 1970, and the second indictment, returned in March, 1971, did not name either Barletta or Fontanello as a party defendant. They were brought into the case when the third indictment, the one with which we are concerned, was returned in October, 1971.

Due to the large number of motions filed by the defendants, and perhaps for other reasons, the case remained in the district court from October, 1971 until it was disposed of finally in the spring and summer of 1975.

Other facts will be stated as the opinion proceeds.

I.

We take up first and deal briefly with the defendants' attack on Title III of the Act and with their complaint about the strike force attorneys.

As to the complaint last mentioned, counsel for the defendants take note of the adverse holdings of this court in *DiGirlomo v. United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, _____ U.S. _____ (1975); *United States v. Agrusa*, 520 F.2d 370 (8th Cir. 1975); and *United States v. Wrigley*, 520 F.2d 362 (8th Cir.), *cert. denied*, _____ U.S. _____ (1975); *see also Scott v. United States*, 522 F.2d 621

(8th Cir. 1975). Counsel state that the point is raised for record purposes only; it is not argued in the briefs, and we reject the contention.

Likewise, counsel recognize that we have upheld as constitutional Title III of the Act. *United States v. John*, 508 F.2d 1134 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975); *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972); and *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974). We adhere to those decisions.

Moreover, we deem it well to say that we agree with the district court that Special Attorney Martin was properly authorized under § 2516 to apply for wiretap authority. And we find, in general and subject to the particular objections of the defendants, that the application and order authorizing the wiretap complied with the requirements of the Act in form and content.

II.

Title III of the Act sets out a detailed procedure whereby district judges are authorized to grant authority to the FBI and other law enforcement agencies to intercept electronically for limited periods of time, not to exceed thirty days, oral and wire communications in cases in which crimes of certain types, including violations of 18 U.S.C. §§ 1084 and 1952 are being investigated. The granting of such authority is circumscribed by stringent conditions designed to protect persons from illegal or unreasonable interceptions and to minimize interceptions of communications which are not subject otherwise to interception.

18 U.S.C. § 2515 provides in general that if an interception is conducted in violation of Title III, the results of the interception and evidence developed from the interception are not admissible in evidence in a number of

types of proceedings, including grand jury proceedings and criminal trials. Specific grounds for suppression are set out in § 2518(10)(a). Moreover, a person who is aggrieved by an unlawful interception is given a civil action for damages, both actual and punitive, and, in addition, may recover a reasonable attorney's fee. 18 U.S.C. § 2520.

As far as this case is concerned, the most important section of the statute is 18 U.S.C. § 2518, the various subdivisions of which prescribe procedures for the obtaining of wiretap authority, the conditions under which such authority may be granted, the persons who must be identified as those whose communications will be intercepted, the findings that must be made before authority can be granted, and the proceedings that must take place after an authorized interception has come to an end or after the authorized period for an interception has expired.

It is established that not every violation of § 2518 calls for suppression; minor violations or noncompliance may be ignored. However, it is also established that if there is a substantial violation of a provision of the statute that is central or functional in promoting the congressional purpose to prevent abuses in wiretapping, suppression may be required even though the violations do not amount to constitutional deprivations. *United States v. Chavez*, 416 U.S. 562 (1974); *United States v. Giordano*, 416 U.S. 505 (1974); *United States v. Kahn*, 415 U.S. 143 (1974). *See also*, in addition to the Eighth Circuit cases cited heretofore, *United States v. Donovan*, 513 F.2d 337 (6th Cir. 1975); *United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975); *United States v. Doolittle*, 507 F.2d 1368, *adhered to on rehearing en banc*, 518 F.2d 500 (5th Cir. 1975); *United States v. Chun*, 503 F.2d 533 (9th Cir. 1974); and *United States v. Martinez*, 498 F.2d 464 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974).

While we think that the Act, like other statutes, must be construed and applied with practicality and that ordinarily

substantial, rather than literal, compliance with its terms suffices, particularly where the government has acted in good faith and where an affected person has sustained no prejudice as a result of an absence of literal compliance, still it must be recognized that the Act expresses a strong public policy against unnecessary, unreasonable or indiscriminate wiretapping. And where there is a substantial violation of a central and significant provision of the Act, suppression may be required even where the government has acted in good faith and the party whose communications have been intercepted has sustained no actual prejudice as a result of the violation.

In *Chun*, *supra*, which was decided soon after the Supreme Court decisions in *Chavez* and *Giordano*, both *supra*, the Court of Appeals for the Ninth Circuit laid down certain guidelines for determining whether a violation of Title III of the Act calls for suppression of the results of a wiretap; it said:

> In resolving this issue, *Chavez* and *Giordano* suggest that there are several important factors which should be considered. As an initial matter, it must be determined whether the particular procedure is a central or functional safeguard in Title III's scheme to prevent abuses. *Chavez*, *supra*, 416 U.S. at 578, . . .;*Giordano*, *supra*, 416 U.S. at 516 . . . . If this test has been met, it must also be determined whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error. *Chavez*, *supra*, 416 U.S. at 573-574, . . . ; *Giordano*, *supra*, 416 U.S. at 524-528 . . . . While in most situations it would not be necessary to reach beyond the above-mentioned factors, it may be that in some instances they will not be completely determinative. In such cases, *Chavez* implicitly suggests a third factor which may have a bearing

on the issue — i.e. whether the statutory requirement was deliberately ignored; and, if so, whether there was any tactical advantage to be gained thereby.

503 F.2d at 542.

III.

It is first claimed that the application filed by Special Attorney Martin and the order based thereon did not comply with the requirements of § 2518(1)(b) and were fatally defective because the application recited that it was based on an affidavit by FBI Special Agent Spencer Hellekson and that a copy of his affidavit was attached to the application, whereas in truth and in fact no affidavit of Hellekson was attached to the application and no such affidavit was presented to the district court. We find that contention to be without merit.

It is true that the Martin application erroneously stated that it was supported by Hellekson's affidavit, but the error did not influence Judge Collinson or anyone else in concluding that wiretap authority should be granted, and it did not prejudice the defendants. Therefore, it can be ignored. *Cf. United States v. Chavez, supra,* 416 U.S. at 573-80; *United States v. Schaefer,* 510 F.2d 1307, 1310 (8th Cir.), *cert. denied,* 421 U.S. 975 (1975); *United States v. Thomas,* 508 F.2d 1200, 1203 (8th Cir.), *cert. denied,* 421 U.S. 947 (1975); *United States v. John, supra,* 508 F.2d at 1137; *United States v. Brick,* 502 F.2d 219, 222-23 (8th Cir. 1974).

The record makes it clear that at least two Special Agents of the FBI were concerned in the investigation. One of them was Mr. Hellekson, and the other was Special Agent William N. Ouseley. The original affidavit in support of the application was prepared and signed by Hellekson and was

mentioned in the application that was prepared at about the same time. However, when the Hellekson affidavit was considered in the Department of Justice it was found to be insufficient in content. A new affidavit was then prepared and executed by Ouseley, and that was the affidavit that was ultimately submitted to and considered by Judge Collinson on January 7, 1970. The whole problem arises from the fact that Mr. Martin simply failed to change his original application that mentioned the Hellekson affidavit.

We agree with Chief Judge Becker that the error was merely clerical and that it did not substantially affect the sufficiency of the application or the judicial action thereon.

IV.

The next contention is that the application and the order based thereon violated §§ 2518(1)(b)(iv) and 2518(4)(a) in that they did not identify any defendant other than Tousa as a person whose communications would be intercepted.

Section 2518(1)(b)(iv) provides that the application must identify the person "if known" committing the offense and whose communications are to be intercepted. And § 2518(4)(a) states that the authorizing order must specify the identity of the person "if known" whose communications are to be intercepted.

Relying on cases like *United States v. Kahn, supra; United States v. Donovan, supra;* and *United States v. Bernstein, supra,* defendants argue that as of January 7, 1970 the government had probable cause to believe that at least the Civellas were involved in the conspiracy, and that their communications, as well as those of Tousa, would be intercepted. Hence, it is contended that the application and order were fatally defective in naming Tousa as the sole interceptee.

An argument subsidiary to the one just mentioned is that the district court erred in overruling a motion for an evidentiary hearing filed shortly before final submission of the case to the district court, the purpose of which hearing was to establish the existence of probable cause with respect to the Civellas and perhaps as to Barletta and Fontanello as well.

The arguments in question are clearly unavailable to Tousa who was named in the application and order. It is not entirely clear to us whether those arguments are put forward as to all of the other four defendants or whether they are actually limited to Nicholas Civella and Anthony Civella. However, the ultimate view that we take of the case renders it unnecessary for us to decide whether the government had probable cause to believe on January 7, 1970 that Barletta and Fontanello were committing the offenses under investigation and would likely be in communication with Tousa on the telephone located in The Trap or whether the district court erred when it refused to grant the evidentiary hearing requested by the defendants substantially more than three years after the indictment had been returned and after Judge Becker had denied the plethora of earlier motions filed by the defendants jointly and singly after the return of the instant indictment in October, 1971. Further discussion in this section of the opinion will be limited to the principal argument that has been mentioned as that argument is applicable to the Civellas.

It is obvious from the record that for many months prior to January 7, 1970 the government had probable cause to believe that Nicholas and Anthony Civella were involved with Tousa in an illegal gambling operation in which the telephone in The Trap would be used. The question, however, is whether on or before the date of the application for the wiretap authority the government had probable cause to believe that either Nicholas Civella or Anthony

Civella would be in communication with Tousa on the target telephone.

The record reflects that Special Agent Ouseley filed two detailed affidavits outlining what had been done and learned in the course of the over-all investigation of the suspected conspiracy. One of those affidavits was the one relied on by Judge Collinson in granting the wiretap application; the other, filed on January 17, 1970 in support of an application for a search warrant, is largely a repetition of the first.

Accepting as true the statements appearing in those affidavits, it appears that prior to January 7, 1970 the government had probable cause to believe that Nicholas Civella was the head or one of the leaders of an extensive criminal organization in Kansas City which organization is referred to at times as "the outfit"; that the bookmaking under investigation was an "outfit" operation; that Anthony Civella and Tousa were actively carrying on the operation as subordinates of Nicholas Civella; that Anthony Civella was obtaining daily wagering information from the defendant Chess in Las Vegas, Nevada, and that Tousa was obtaining similar information from other sources; that The Trap was the center or a principal center of the operation; and that Tousa was making extensive use of the phone in the prosecution of the business of the operation.

Granting that the government had reasonable cause to believe that the facts above stated existed, it seems unrealistic to us to say that the government did not have reasonable cause to believe that at some stage during the wiretap period Tousa would be in communication with the respective Civellas or they with him by means of the target telephone, and that the communications would be intercepted. And in this connection, it is to be observed that the indictment charges, among other things, that it was a part of the conspiracy that Anthony Civella would pass on

to Tousa the "sports line" that the former was receiving from Las Vegas. While the government probably did not have actual knowledge of that fact prior to the interceptions, we think that the government did have probable cause to believe prior to January 7 that Anthony Civella and Tousa would exchange information and that the telephone at The Trap would probably be used to that end.

It follows, therefore, that in order to comply literally with the relevant subsections of the statute it was necessary for the government to identify the Civellas in the application and for the district court to identify them, as well as Tousa, in the authorizing order. That, of course, was not done, but after the wiretap had come to an end, both Civellas along with Tousa were ordered to be served with inventories as provided by § 2518(8)(d), and they were served with inventories.

The question on this phase of the case, then, is whether the failure to comply literally with the requirements of §§ 2518(1)(b)(iv) and 2518(4)(a) invalidated the order of January 7 as far as the Civellas were concerned and required the suppression as to them of the results of the wiretap and evidence discovered by reason of those results.

The decision of the Supreme Court in *United States v. Kahn, supra,* was a negative one to the effect that where the government does not have reasonable cause to believe that an individual is involved in a criminal operation that will probably involve him in culpable communications by means of a target telephone, the government is not required to name him in the initial application for wiretap authority and the district court is not required to identify him in the authorizing order, although in its discretion the district court later may order him to be served with an inventory as provided by § 2518(8)(d).

Kahn can be read as holding, in converse, that where the government has probable cause to believe that a number of persons are involved in criminal conduct and that their communications in connection with that conduct are likely to be intercepted if certain wiretap authority is granted, it is mandatorily required that all of those persons be identified as prospective interceptees in both the application for the authority and in the authorizing order, and that a failure to do so constitutes a violation of a central and significant requirement of the statute and requires suppression of wiretap results as to the unidentified persons even though they receive notice later that their conversations have been intercepted.

The *Kahn* case has been so read in *United States v. Donovan* and *United States v. Bernstein*, both *supra*. A different result has been reached by the majority of a divided Court of Appeals for the Fifth Circuit in *United States v. Doolittle, supra.*[4]

In *Doolittle*, as here, plural defendants were indicted for violations of 18 U.S.C. § 1084 and § 1952, and, as here, the government's case was based on the results of an authorized wiretap. As to three defendants the government when it obtained the wiretap authority had probable cause to believe that they were involved in the offense and that their communications would probably be intercepted. They were not identified in the application or in the authorizing order. However, the district court later directed that inventories be served on them; they were served on the defendants in question; the tape recordings of their conversations were made available to them, and they sustained no prejudice as a result of not being identified originally. The district court denied their motions to suppress; they were convicted and appealed.

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[4] According to the current issues of Shephard's Federal Citations, Part I, petitions for writs of certiorari in all three of those cases are now pending in the Supreme Court.

A majority of a three-judge panel of the Court of Appeals affirmed the conviction. It was said:

> The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in *Kahn*, they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to

> them inadmissible under 18 U.S.C.A. § 2518(10)(a).
>
> 507 F.2d at 1371-72.

The defendants moved for rehearing en banc, and their application was granted. 507 F.2d at 1377. The case was heard en banc by fourteen of the fifteen Circuit Judges in regular commission; an eight-judge majority voted to uphold the panel decision and expressed their view in a per curiam opinion. 518 F.2d at 500-01. Chief Judge Brown and Circuit Judges Wisdom, Goldberg and Simpson joined Judge Thornberry in the dissent that he filed as a member of the original panel. 518 F.2d at 501. Judge Goldbold filed a separate dissent in which he differed not only with the majority but also to a certain extent with his fellow dissenters. 518 F.2d at 501-04.

The question is not without difficulty because we have no doubt that the initial identification requirements of the statute are central and significant requirements and are not lightly to be ignored. However, we, like the majority of the *Doolittle* court, are unwilling to say that a defendant who ought to have been identified initially is automatically entitled to have evidence of his communications suppressed merely because he was not identified originally as a potential interceptee.

We think that if the identification requirements of the Act are satisfied with respect to the individuals who are identified originally, and if defendants who were not identified originally, although they should have been, are promptly notified in substantial compliance with § 2518(8)(d) of the fact and circumstances of the interception of their communications so that they may apply to the issuing judge for an order making available to them the contents of the intercepted communications, the purpose of §§ 2518(1)(b)(iv) and 2518(4)(a) has been achieved and that there has been a sufficient substantial compliance with those subsections.

In the instant case there is nothing to suggest that the government acted in bad faith or with deceptive intent when it failed to identify the Civellas in the application, or that it had anything to gain by not naming them, or that Judge Collinson would have acted differently than he did had the Civellas been named. When the matter reached the stage at which the inventory requirements of § 2518(8)(d) came into play, counsel for the government brought the Civellas to the attention of the district judge to the end that they might be served with inventories. Inventories were served on them and the recordings of their conversations were made available to them well in advance of final submission of the case.

Therefore, we reject the contentions of the Civellas based on noncompliance with §§ 2518(a)(b)(iv) and 2518(4)(a).

V.

The remaining contention made by the defendants jointly is based on alleged noncompliance with § 2518(8)(d) which has already been mentioned from time to time.

Insofar as here pertinent, that subsection provides that within a reasonable time but no more than ninety days after the expiration of an authorized interception period the judge authorizing the interception must cause inventories to be served on all persons mentioned in the order and may in his discretion order that inventories be served on such other parties as the judge determines should be served in the interests of justice. The inventory must reveal the fact of the entry of the order; the date of the entry and the period of approval of the interception; and the fact that communications of the person involved were or were not intercepted. And the subsection then goes on to provide that the district judge may in his discretion make available to such person or his attorney for inspection such portions of the intercepted communications and of the application and

order as the judge determines to be in the interest of justice. While the subsection permits the district judge on ex parte application and for good cause shown to postpone the service of inventories, he is not given any authority to dispense with them altogether.

The Civellas and Tousa concede that they were served with inventories, but they complain that they were not served within the statutory ninety day period.

As stated, Barletta and Fontanello were not indicted until October, 1971; Judge Collinson never entered an order directing that § 2518(8)(d) inventories be served on them, and they were never served with such inventories. It was only after they were indicted that they received any direct and positive knowledge that conversations of theirs had been intercepted and had made available to them the tapes of the recordings of the conversations involving them.

The interception period ended on January 18, 1970, and the ninety day period for the serving of inventories expired on April 18 of that year. On March 27, 1970 Judge Collinson ordered inventories served on the Civellas, Tousa and certain other persons, not including Barletta and Fontanello. Since the Civellas and Tousa were local people, the marshal should have had no difficult in effecting service well within the ninety day period. However, for some reason not disclosed by the record Tousa was not served until April 23, 1970 which was five days after the expiration of the ninety day period, and the Civellas were not served until May 1, 1970 which was thirteen days after the expiration of the ninety day period.

A § 2518(8)(d) problem was squarely presented to this court in *United States v. Wolk, supra.* In that case the time for serving inventories, as extended, expired on June 30, 1971. The prospective defendants were arrested before indictment on June 21 and June 22. On June 22 the district court ordered inventories served on all of the defendants,

and the inventories were placed in the hands of the marshal for service; by June 24 all of the defendants save three had been served. The defendants were indicted on June 25. The three defendants who had not been served with inventories were arraigned in July and August. By the time of arraignment counsel for all three of those defendants had received copies of the application, supporting affidavit, and the order authorizing the interception. After the arraignments counsel for all of the defendants were permitted to inspect and copy both the original tapes and the transcript of the recordings. Two of the three defendants in question were not served inventories until September 4, 1971, and the third one was never served with an inventory.

As to those three defendants, the district court suppressed the results of the wiretap, and the government appealed. This court reversed. It was held that in spite of the delay in serving inventories on two of the three appellees and in spite of the fact that one of them was never served with an inventory, there had been substantial compliance with § 2518(8)(d). It was emphasized that there was no showing of intentional violation of the statute, and that the defendants had not been prejudiced by the lack of compliance with the statute.

While there are points of distinction between *Wolk* and the instant case, it would appear that application of *Wolk*, as such, to this case, would probably result in a rejection of the contention of at least the Civellas and Tousa. *Wolk*, however, was decided substantially prior to the *Giordano* and *Chavez* decisions of the Supreme Court, a point specifically noted in *United States v. Donovan, supra*, 513 F.2d at 343, and perhaps too much reliance should not be placed on it today.

Although § 2518(8)(d) does not come into play until after a wiretap has been completed, still it has been held to be a substantial and functional part of the congressional policy of limiting wiretapping, *United States v. Donovan, supra*,

513 F.2d at 343-44, and *United States v. Chun, supra*, 503 F.2d at 542, and we shall so consider it.

We take up, first, the § 2518(8)(d) claim of the Civellas and Tousa. It does not appear to us that the statute was deliberately ignored, or that the government undertook to delay service of the inventories on those defendants or that it had anything to gain by the delays which were extremely short as compared to those involved in *Wolk*. Nor, in our opinion did the delays prevent the purpose of § 2518(8)(d) from being achieved. The purpose of that subsection is to insure that a person whose communications have been intercepted receives notice of that fact within a comparatively, though not extremely, short period of time after the expiration of the interception period. Had the inventories been served promptly, and we do not know why they were not served promptly, § 2518(8)(d) would have been satisfied literally, and we do not consider that the five day delay in the case of Tousa and the thirteen day delay in the case of the Civellas were significant. As indicated, Tousa was served in late April, 1970, and the Civellas were served on May 1 of that year. The first indictment was not returned until October.

We conclude, therefore, that there was substantial compliance with the inventory requirements of the statute as far as Tousa and the Civellas were concerned, and we reject their § 2518(8)(d) contention.

A quite different situation is presented with respect to Barletta and Fontanello. As to them, no effort was made to comply with the inventory requirements of the statute and those defendants received no notice of the interceptions of their communications until the third indictment was returned nearly two years after the authorized wiretap had come to an end. And it would be stretching things too far to say that the fact that they received full information about the interceptions after they were indicted in the fall of 1971 amounted to a substantial compliance with the statute. The wiretap evidence should have been suppressed as to them.

VI.

From what has been said, it follows that the convictions of Tousa and the Civellas will be affirmed. The convictions of Barletta and Fontanello will be reversed, and the cause remanded with directions that judgments of acquittal be entered as to them.

The disposition that we make of Fontanello's case makes it unnecessary for us to determine whether in any event the evidence was sufficient to support his conviction. We will say that the evidence against him was extremely weak and consisted of nothing but the interception which an FBI expert placed on one ambiguous conversation on the telephone between Fontanello and Tousa.

Affirmed as to Nicholas Civella, anthony Thomas Civella and Frank Anthony Tousa.

Reversed and remanded with directions as to Joseph Barlett and Thomas Fontanello.

A true copy:

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1522 **September Term, 1975**

The United States,
Appellee,

vs.

Nicholas Civella,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

April 16, 1976

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1525 **September Term, 1975**

The United States,
Appellee,

vs.

Anthony Thomas Civella,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

April 16, 1976

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1528 **September Term, 1975**

The United States,
Appellee,

vs.

Frank Anthony Tousa,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby affirmed.

April 16, 1976

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1530 **September Term, 1975**

The United States,
Appellee,

vs.

Joseph Barletta,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and commitment of the said District Court in this cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause be the same is hereby remanded to the said District Court for proceedings consistent with this Court's opinion.

April 16, 1976

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1532 **September Term, 1975**

The United States,
Appellee,

vs.

Thomas Fontanello,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause be and the same is hereby remanded to the said District Court for proceedings consistent with this Court's opinion.

April 16, 1976

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS.

Application

David H. Martin, an attorney of the Organized Crime and Racketeering Section, Criminal Division, United States Department of Justice, being duly sworn states:

This sworn application is submitted in support of an order aut. orizing the interception of wire communications. This application has been submitted only after lengthy discussion concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, Department of Justice, Washington, D.C., together with agents of the Federal Bureau of Investigation.

1. I am an "investigative or law enforcement officer — of the United States" within the meaning of Section 2510(7) of Title 18, United States Code — that is, I am an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, to authorize affiant to make this

application for an order authorizing the interception of wire communications. The letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

3. This application seeks authorization to intercept wire communications concerning offenses enumerated in Section 2516 of Title 18 — that is, offenses involving the interstate transmission of wagers and wagering information by a person engaged in the business of wagering in violation of Title 18, United States Code, Section 1084, and the use of facilities in interstate commerce with intent to carry on an unlawful activity involving gambling in violation of Title 18, United States Code, Section 1952, which are being committed by Frank Tousa.

4. I have discussed all the circumstances of these offenses with Special Agent Spencer Hellekson of the Federal Bureau of Investigation, who has conducted the investigation herein and I have examined the affidavit of Special Agent Spencer Hellekson (attached to this application as Exhibit B, and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) there is probable cause to believe that Frank Tousa is committing and is about to commit offenses involving the interstate transmission of wagering information and use of interstate facilities with intent to carry on an unlawful activity involving gambling.

(b) there is probable cause to believe that wire communications concerning these offenses will be obtained through the interception, authorization for which is herein applied for. In particular these wire communications will concern the receipt and dissemination of the sports "betting line" by Frank Tousa, and the placing of bets with Frank Tousa.

(c) normal investigative procedures reasonably appear to be unlikely to succeed.

(d) telephone facilities located at the Northview Social Club, at 1048 E. 5th Street, Kansas City, Missouri, and carrying telephone number 421-8727 is being used and will be used in connection with the offense described above, and is commonly used by Frank Tousa.

5. No other application for authorization to intercept wire or oral communications from the above-described or any other facilities has been made in connection with the instant investigation.

Wherefore, your affiant believes that probable cause exists to believe that Frank Tousa is engaged in the commission of offenses involving the interstate transmission of wagers and wagering information, and use of interstate facilities with intent to carry on an unlawful activity involving gambling; that he has used, is using, and will use the telephone facilities located at 1048 E. 5th Street, Kansas City, Missouri, bearing the number 421-8727, in connection with the commission of these offenses; that communications concerning these offenses will be intercepted from those facilities; and that no other investigative procedure reasonably appears likely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit attached, affiant herewith requests this Court to issue an Order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation to intercept wire communications from the above described facilities until communications are intercepted which reveal the commission of the offenses by Frank Tousa described herein and the identity of the participants involved in the commission of said offenses with Frank Tousa, or for a period of ten (10) days from the date

of that Order, whichever is earlier. It is further requested that the interception order limit the interception to the times when Frank Tousa is physically inside the premises located at 1048 E. 5th Street, Kansas City, Missouri, and during those times when it is determined through voice recognition that Frank Tousa is using telephone bearing No. 421-8727.

/s/ DAVID H. MARTIN
Attorney, U.S. DEpartment of Justice

Subscribed to and sworn before me this 7th day of January 1970, at Kansas City, Missouri.

/s/ WM. T. COLLINSON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

Application of the United States of America in the Matter of an Order Authorizing the Interception of Wire Communications — No. . . .

ORDER

Authorizing Interception of Wire Communication

To: Special Agents of the Federal Bureau of Investigation,
United States Department of Justice

Application under oath having been made before me by David H. Martin, an attorney with the Organized Crime and Racketeering Section of the Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the court finds:

(a) there is probable cause to believe that Frank Tousa, presently operating from 1048 E. 5th Street, Kansas City, Missouri, is committing and is about to commit and is conspiring, in violation of Section 371 of Title 18, United States Code, with other persons to commit an offense set forth in Section 2516 of Title 18, United States Code, to wit: the use of interstate telephone communication facilities for the transmission of wagering information and in aid of racketeering enterprises, in violation of Sections 1084 and 1952 of Title 18, United States Code.

(b) there is probable cause to believe that communications concerning these offenses will be obtained through the interception of wire communications. In particular, these wire communications will concern the transmission of wagering information such as the receiving and dissemination of the sports "betting line" to the confederates of Frank Tousa and the placing of bets with Frank Tousa or one of his agents as yet unknown.

(c) all normal investigative procedures have been used, but none appears reasonably likely to succeed in obtaining the above information.

(d) there is probable cause to believe that the telephone facilities at 1048 E. 5th Street, Kansas City, Missouri, listed in the name of Thomas Maroon, and carrying the telephone number 421-8727, is being used and is about to be used in connection with the commission of the above-described offenses and is commonly used by Frank Tousa.

Wherefore, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the Department of Justice, the Honorable Will Wilson, who has been specially designated by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on him by Section 2516 of Title 18, United States Code, to:

(a) intercept wire communications of Frank Tousa, ~~and unknown others~~ from the telephone facilities at 1048 E. 5th Street, Kansas City, Missouri, and bearing the telephone number 421-8727.

(b) such interception shall not automatically terminate when the type of communication described above in paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the details of the scheme which have been used to transmit gambling information, and the participants and nature of the conspiracy involved therein, or for a period of ten (10) days from the date of this Order, whichever is earlier.

(c) such interceptions shall be made only when Frank Tousa by surveillance of agents of the Federal Bureau of Investigation is determined to be physically inside the premises at 1048 E. 5th Street, Kansas City, Missouri, and shall be continued only when it is determined by voice recognition that Frank Tousa is using the phone bearing No. 421-8727.

Providing That, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, of the United States, and must terminate upon attainment of the authorized objective or, in any event, at the end of ten (10) days from date.

Providing Also, that David H. Martin shall provide the court with a report on the 5th day following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. This order to be effective commencing Jan. 8th, 1970.

/s/ WM. T. COLLINSON
Judge

Date: Jan. 7th, 1970

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

Application of the United States of America in the Matter of an Order Authorizing the Use of a Pen Register.

Order Authorizing Use of a Pen Register

To: Special Agents of the Federal Bureau of Investigation, United States Department of Justice.

Affidavit having been made before me by William N. Ouseley, Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and full consideration having been given to the matters set forth therein the court finds:

(a) there is probable cause to believe that Frank Tousa and others as yet unknown have committed and are committing offenses involving the use of interstate telephone communication facilities for the transmission of wagering information and in aid of racketeering enterprises, in violation, respectively, of Sections 1084 and 1952 of Title 18, United States Code, and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that the telephone subscribed to in the name of Northview Social Club at 1048 East 5th Street, located in Kansas City, Mo., and bearing number 421-8727, has been used and is being used by Frank Tousa and others as yet unknown in connection with the commission of the above-described offenses.

Wherefore, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized to:

(a) install a mechanical device on the telephones subscribed to by Thomas Maroon located in Northview Social Club at 1048 E. 5th Street, Kansas City, Mo., and bearing the number 421-8727, which will reveal the telephone numbers of all outgoing calls dialed from the above-described telephone.

(b) such mechanical device shall continue in operation until the telephone numbers of all outgoing calls dialed lead to the identities of the confederates of Frank Tousa, and their places of operation, or for a period of ten (10) days from the date of this Order, whichever is earlier.

Provided That, this authorization to install and operate the above-described mechanical device must terminate upon attainment of the authorized objective, or, in any event, at the end of ten (10) days from the date of this Order. Effective date of this Order to be Jan. 8th, 1970.

/s/ WM. T. COLLINSON
Judge

Date: Jan. 7th, 1970

No. 75-1813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NICHOLAS CIVELLA, ANTHONY THOMAS CIVELLA,
AND FRANK ANTHONY TOUSA,
Petitioners,

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

EDWARD P. MORGAN
Welch, Morgan & Kleindienst
300 Farragut Building
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IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff.

v.

Criminal Action
No. 23562-3

NICHOLAS CIVELLA, *et al.*,
Defendants.

MEMORANDUM ON DENIAL OF MOTIONS, AMENDED MOTIONS, AND SUPPLEMENTAL MOTIONS TO SUPPRESS INTERCEPTED WIRE COMMUNICATIONS AND TAPE OF PEN REGISTER AND OTHER MOTIONS

Repeatedly in timely filed written original motions, supplemental and amended motions (filed with leave of Court) in which all defendants were granted leave to join, the defendants have repeatedly sought to suppress recorded communications intercepted by a Court authorized wiretap and the tape of an authorized pen register surveillance. (Untimely motions and suggestions for hearings filed without leave after the setting of the last of the adjourned plenary evidentiary hearings have been denied for untimeliness as well as lack of merit. For example, see the "Motion for an Order Setting an Evidentiary Hearing of Defendant Anthony Civella" filed March 7, 1975, over three years after this action was commenced and after

numerous trial settings and many plenary pretrial evidentiary hearings.)

The first consolidated motion of all defendants, which was filed on November 29, 1975, sought suppression of the results of a Court authorized wiretap beginning on January 8, 1970, and continuing until and including January 17, 1970. The telephone facilities that were the subject of the electronic surveillance were located at 1048 East Fifth Street, Kansas City, Missouri. These premises were occupied by defendant Tousa.

This original motion by all defendants charged that the judicial authorization for the wiretap under Section 2518, Title 18, United States Code, failed to comply with Section 2518 in the following respects:

(a) The application for the order of authorization made by David H. Martin failed to comply with subparagraph (1)(b) of Section 2518 in that it does not contain a full and complete statement of the facts relied on by the applicant to justify his belief that an order should be issued except to incorporate an affidavit of Special Agent Helleckson "Which was not filed with the application or presented to the Court."

(b) The application does not contain a full and complete statement whether other investigative procedures had been tried and had failed, or were reasonably apparent to succeed if tried or were too dangerous, thereby violating the Fourth Amendment to the Constitution of the United States.

(c) No factual showing of probable cause was made to support the Court's determination of probable cause.

(d) The letter of authorization (assumed then to be from Will Wilson) covers only offenses in violation of Sections 1084 and 1952, Title 18, United States Code, by defendant Tousa, and not a crime of conspiracy

under Section 1371, Title 18, United States Code, and the authorization is therefore void.

(e) None of the defendants were served with an inventory as required by Section 2518, Title 18, United States Code.

(f) The execution of the authorization exceeded the order of authorization and the underlying statutory authority of Sections 2510 *et seq.*, Title 18, United States Code, because while the order authorized the interruption of wire communications of Frank Tousa from the telephone facilities at 1048 East Fifth Street (1) calls to Tousa and from other persons were intercepted, (2) report of the interception was not timely made, and (3) the interception did not cause an attainment of its objective.

(g) Counsel for the Government made unauthorized disclosures of the intercepted tapes to prospective witness Alvin Hurst.

(h) The order of authorization and Section 2501 *et seq.* of Title 18, United States Code, as amended in 1968, is unconstitutional for many reasons.

(i) The use of a pen register was illegal because (1) there was no authorization for an application therefor, and (2) it was unlawful on many grounds, including violation of the Fourth Amendment to the Constitution of the United States.

Since the filing of the original consolidated motion, several waves of discovery exposed the full factual background as the exploratory and conflicting jurisprudence finally reached resolution by the Supreme Court of the United States in *United States v. Giordano*, ____ U.S. ____, 94 S.Ct. ____, 40 L.Ed.2d 341 (1974), and *United States v. Chavez*, ____ U.S. ____, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974). The latest timely pretrial consolidated sup-

plemental and amended motions of all defendants were filed, with leave of Court, on May 20, 1974. As a result of the supplemental and amended motions several additional and varying factual and legal contentions were advanced and considered. None of the original and additional factual and legal contentions have support in the evidence or the law.

After May 20, 1974, additional suggestions and discovery motions and requests of defendants were received and granted in an effort to grant to the defendants the most liberal discovery legally possible under the circumstances. In the meantime, many trial settings were made and postponed because of the requests of the defendants for further discovery and more pretrial evidentiary hearings, as disclosed quickly by the voluminous Criminal Docket sheet entries in this action.

The pretrial discovery orders and evidentiary hearings in this action ultimately granted to the defendants the maximum discovery requested in timely motions for leave to file which the times of which were liberally extended over a period of more than three years. In no reported case have equally liberal opportunities for timely pretrial discovery been granted to defendants in a similar action. Counsel for the defendants have used every discovery opportunity to the fullest except (a) the twice offered opportunity to depose former United States Attorney General John N. Mitchell, and (b) the final opportunity for examination, by experts chosen by defendants, of the disputed handwriting and genuine exemplars of the handwriting of John N. Mitchell. At the final adjourned pretrial evidentiary hearing fixed for final offer of pretrial evidence on the issue of the genuineness of the initials "J.N.M." on the authorization for the wiretap application, the defendants stated that they had no further evidence to offer, although ample opportunities for examination of the materials in evidence was twice available.

The legal and evidentiary bases of the defendants' timely asserted grounds for suppression of the evidence secured by electronic surveillance has been fully explored.

As the extended and adjourned plenary pretrial evidentiary hearings came to a close, it was apparent that the evidence, regardless of the incidence and degree of the burdens of proof and burdens of going forward with the evidence, did not support the timely filed motions and supplemental and amended motions of the defendants to suppress the evidence secured by the challenged electronic surveillance and that all the motions to suppress should be denied. Therefore, the order of denial thereof was entered and this action was set for trial on May 5, 1975, at Springfield, Missouri, before the Honorable William R. Collinson of this Court.

The evidence proved beyond reasonable doubt that John N. Mitchell, when Attorney General of the United States, personally authorized the application for the challenged electronic surveillance, despite earlier assumptions attributable to the Government that Will Wilson did so.

The evidence further proved, convincingly and beyond doubt, that the reference to the "affidavit" of "Special Agent Helleckson" in the application submitted to Judge Collinson was an obvious clerical error, referring to a draft of a proposed affidavit of Agent Helleckson rejected in the administrative review of the sufficiency of the original drafts of papers found undesirable. In a criminal action, a judicial record containing such an error is correctable at any time under Rule 36 of the Federal Rules of Criminal Procedure. That the clerical error did not substantially affect the sufficiency of the application, nor the judicial action thereon, is clearly proven by the evidence and supported by the controlling authorities. *United States v. Chavez*, 416 U.S. 562, 94 S.Ct. 1489, 40 L.Ed.2d 380; *United States v. Brick* (C.A.8) 502 F.2d 219.

The conclusion that the motions and supplemental and amended motions to suppress should be denied on the grounds asserted under the controlling jurisprudence is now fully apparent. See among other controlling authorities cited in the briefs, the leading cases *United States v. Giordano, supra; United States v. Chavez, supra; United States v. Brick, supra.*

After three years of discovery and protracted evidentiary hearings during which the defendants were given every opportunity to discover and offer evidence in pretrial hearings on motions one of the counsel for defendant Anthony Civella, without leave of Court, filed dilatory untimely motions to secure *de novo* evidentiary hearings previously available for many months but not requested. Counsel went to the extreme of issuing and causing to be served subpoenas *duces tecum* on government personnel returnable when no hearing was set and hearings were closed by formal orders made in open court. These untimely motions, apparently designed to abort the last setting for trial and to reopen pretrial proceedings concluded after years of effort were terminated by orders of Court.

With respect to the motions for dismissal of the indictment because of the lack of authority of the special "Strike Force" attorneys of the Kansas City Field Office to appear before the Grand Jury, the motions have been denied without prejudice to reopen the matter if and when the Court of Appeals has ruled on the question raised by conflicting decisions of Divisions Nos. 1 and 4 of this Court. Further, regardless of the manner of resolution of that conflict, the authority of the special attorneys in case may be established by the specific terms of the authorizations applicable to cases of this character.

/s/ William H. Becker
William H. Becker
Chief Judge

Kansas City, Missouri
Date: 4-28-75

No. 75-1813

In the Supreme Court of the United States

OCTOBER TERM, 1976

NICHOLAS CIVELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
DENNIS A. WINSTON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1813

NICHOLAS CIVELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-22) is reported at 533 F. 2d 1395.

QUESTIONS PRESENTED

1. Whether the government's failure to notify petitioners that they were overheard during a telephone interception within ninety days of the end of the authorized period of interception warrants the suppression of the evidence obtained against them, when there was no showing of prejudice resulting from the delay.

2. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of every person who the government has probable cause to believe will be overheard participating in conversations about illegal activities.

3. Whether the inadvertent misidentification of the maker of the affidavit supporting a telephone interception application requires the suppresssion of evidence obtained through the interception.

STATEMENT

After a jury-waived trial in the United States District Court for the Western District of Missouri, petitioners were convicted, together with Joseph Barletta and Thomas Fontanello, of conspiring to conduct an illegal gambling business, and of using facilities of interstate commerce in furtherance thereof, in violation of 18 U.S.C. 371, 1084(a), and 1952. Each petitioner was sentenced to 42 months' imprisonment; in addition, the Civellas were each fined $5,000, and Tousa was fined $2,000. The court of appeals affirmed (Pet. App. A-22).[1]

1. On January 7, 1970, Judge William Collinson of the United States District Court for the Western District of Missouri issued an order pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, authorizing the interception of wire communications of Frank Tousa over a telephone at the Northside Social Club in Kansas City, Missouri. (Pet. App. A-3). The interception was authorized for ten days beginning on January 8, 1970; it actually ended by January 17, 1970. (*Ibid.*)

Acting pursuant to 18 U.S.C. 2518(8)(d), Judge Collinson on March 25, 1970, ordered inventory notices served on Tousa (who alone had been named in the wire interception order), the Civellas, and others who were never

[1]It reversed the convictions of Barletta and Fontanello (Pet. App. 21a-22a). The government has petitioned for a writ of certiorari, No. 76-169, seeking review of this reversal.

indicted, informing them that certain of their communications had been intercepted. Tousa was served with such notice on April 23, 1970, and both of the Civellas were served on May 1, 1970. In October 1970 and March 1971, successive indictments were filed against petitioners, and in October 1971, a final superseding indictment was returned, upon which petitioners were tried and convicted in mid-1975 (Pet. App. A-6).

2. As established by stipulation and summarized by the court below,[2] the facts revealed that between July 1968 and January 1970 petitioners were involved in a large scale gambling operation, prohibited by Missouri law, which entailed accepting wagers on various athletic contests (Pet. App. A-5). The operation was run from the Northside Social Club primarily for the benefit of Nicholas Civella (the reputed head of organized crime in Kansas City and owner of the Club) by Tousa and Nicholas' nephew, Anthony Civella (Pet. App. A-4, A-5).

3. The court of appeals found that the government has sufficient probable cause to name both the Civellas in the interception application, and that consequently naming only Tousa constituted a technical noncompliance with the requirements of 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a). The court held, however, that under the particular circumstances of this case, suppression of evidence was not warranted for this noncompliance. (Pet. App. A-18, A-19).[3]

[2]Petitioners stipulated to the facts which constituted the essence of Count five of the indictment in which they were charged.

[3]The court of appeals followed the reasoning and result of *United States* v. *Doolittle*, 507 F. 2d 1368, adhered to in rehearing *en banc*, 518 F. 2d 500 (C.A. 5), petition for a writ of certiorari pending, No. 75-513.

The court also rejected petitioners' contentions with respect to the service of the inventory notices and the sufficiency of the affidavit supporting the intercept application. It held that the error involving the affidavit was "merely clerical" (Pet. App. A-11a), and that, since there was no evidence of governmental bad faith and because the inventories were served sufficiently in advance of the indictment, the government had substantially complied with the inventory requirement (Pet. App. 21-23). In short, the court of appeals concluded that suppression of the evidence as to the three petitioners was not warranted.

ARGUMENT

Petitioners principally contend that certiorari should be granted here because the Court has already agreed to review similar issues in *United States* v. *Donovan*, No. 75-212, certiorari granted February 23, 1976. The inventory notice issues in *Donovan* and this case are substantially different: here, the question is only whether the late service of inventory notices warrants suppression, not, as in *Donovan*, the extent of the government's obligation to inform the court concerning those upon whom such service might be appropriately ordered. The other issue in *Donovan* is whether the government must identify, in the application for a wire interception order, all persons whom the government has probable cause to believe it will overhear participating in conversations about illegal activities. But regardless of this Court's resolution of that issue, the affirmance of the convictions of petitioners Tousa and Nicholas Civella was correct; Tousa was named in the application and order, and there was no probable cause to believe that petitioner Nicholas Civella would be overheard. Thus, only petitioner Anthony Civella's case turns on this Court's decision in *Donovan*.

1. The delay in the service of inventory notices on petitioners does not warrant the suppression of the intercepted evidence against them. Section 2518(8)(d) provides that inventory notice, when required, shall be given "[w]ithin a reasonable time but not later than ninety days" after the termination of an interception order. Petitioner Tousa was served with inventory notices on April 23, 1970, five days after the expiration of that ninety day period; the Civellas were served on May 1, 1970, thirteen days thereafter.[4] Petitioners do not claim they were prejudiced by the minor delay; they argue, relying on the court of appeals decision in *Donovan*, that the inventory notice provision "plays a central role in the statutory scheme" (Pet. 15), and that failure to comply strictly with the inventory provision requires automatic suppression.

This Court has construed Section 2518(10)(a)(i) of the Act, providing for suppression of communications "unlawfully intercepted," to mandate suppression not for "every failure to comply fully with any requirement provided in Title III" (*United States* v. *Chavez*, 416 U.S. 562, 574-575), but only if such failures involve "any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device" (*United States* v. *Giordano*, 416 U.S. 505, 527). For the reasons noted in our *Donovan* brief, a copy of which we are serving on petitioners, the inventory

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[4]The record does not indicate why the inventories were not served in time. Service was accomplished five months before petitioners were indicted the first time and seventeen months before the return of the third indictment, upon which they were ultimately convicted in 1975.

notice provisions are not such statutory requirements. In any event, the 90 day notice period can hardly be considered a direct and substantial means of implementing the intent to limit the use of the intercept procedures. Accordingly, *Giordano* and *Chavez* teach that suppression is not warranted for delays in serving the required notices, in the absence of any prejudice resulting from such delays.[5]

2. Petitioners contend that the evidence against them should have been suppressed because the wire interception application and order named only Tousa although the government allegedly had probable cause to believe that the Civellas would also be overheard discussing illegal activities over the target telephone.

a. Petitioner Tousa does not have standing to seek suppression on this basis. Tousa was named in the application and order, and thus cannot seek suppression of the evidence on the ground of any failure to identify him; instead, he asserts a defect relating solely to two others. But Tousa cannot here assert the rights of the Civellas as a basis for suppression of evidence obtained without violation of his own rights. "[S]tanding to invoke the exclusionary rule had been confined to situations where the Government seeks to use such

[5]The court in *United States* v. *Smith*, 463 F. 2d 710 (C.A. 10), noted that the inventory notice provision of Section 2518(8)(d) was modeled on conventional search warrant procedure as defined in Rule 41(d), Fed. R. Crim. P. See Senate Rep. No. 1097, 90th Cong. 2d Sess. (1968), 711. Since failure to comply with the return and filing requirements for conventional search warrants justifies suppression of the evidence seized only upon an affirmative showing of prejudice, the *Smith* court correctly concluded that the same rule should apply to the 90 day notice provision of Section 2518(8)(d). Accord, *United States* v. *Rizzo*, 492 F. 2d 443, 447 (C.A. 2).

evidence to incriminate the victim of the unlawful search." *United States* v. *Calandra*, 414 U.S. 338, 348. The traditional standing rules were incorporated into the suppression sections of the wire interception statute. 18 U.S.C. 2518(10)(a); S. Rep. No. 1097, 90th Cong., 2d Sess., pp. 91, 106 (1968); *Alderman* v. *United States*, 394 U.S. 165, 171-172, 175 n. 9. Having been named in the application and order, Tousa cannot claim that he was a victim of an unlawful search; therefore, he has no standing to seek suppression based upon a failure to identify other individuals. *United States* v. *Scully, et al.*, C.A. 9, Nos. 74-2479, 74-2295, 74-1891, 74-1887, decided May 24, 1976.[6]

[6]*United States* v. *Bellosi*, 501 F. 2d 833 (C.A. D.C.), is not inconsistent with this conclusion. There, the court found that the failure to inform the authorizing judge that the conversations of one of the targets of the proposed interception had previously been intercepted rendered the entire subsequent interception illegal, since that information might have led to the denial of the authorization for the subsequent interception (*id.* at 838-839). Accordingly, the court concluded that the subsequent communications were "unlawfully intercepted" and subject to suppression on the motion of any "aggrieved person" under 18 U.S.C. 2518 (10)(a), including any persons who were parties to the improperly intercepted conversations or against whom the interception was directed, 18 U.S.C. 2510(11). But see *United States* v. *Kilgore*, 524 F. 2d 957, 958, n. 1 (C.A. 5), petition for a writ of certiorari pending, No. 75-963. In contrast, here any failure to identify others in the application who might be overheard, when the main target was named, could scarcely have led to the denial of the intercept order and thus did not constitute a significant violation of any mandatory requirement of the Act of the kind involved in *Bellosi*. See *Donovan* brief, pp. 34-36. But see *United States* v. *Picone*, 408 F. Supp. 255, 262 (D. Kan.), appeal pending, C.A. 10, No. 76-1027. Cf. *United States* v. *Chiarizio*, 525 F. 2d 289 (C.A. 2), in which the court assumed without deciding that a named conspirator had standing to object to the failure to name a co-conspirator, but then concluded the objection was without merit.

b. The government did not have probable cause to believe that it would overhear Nicholas Civella discussing illegal activities over the telephone involved. Therefore, even assuming the court of appeals in *Donovan* correctly interpreted Section 2518(1)(b)(iv), the failure to name Nicholas Civella in the wire interception application and order was not improper.

The finding of the court of appeals that there was sufficient probable cause to name Nicholas Civella was based upon the affidavit of FBI Agent William Ouseley (R. 364-374).[7] But, far from supporting a finding of probable cause, Ouseley's affidavit indicates that Nicholas Civella had insulated himself from the day-to-day details of the gambling operation. The affidavit contains no example of any use of a telephone by Nicholas Civella himself. Instead, it explains that he was "the boss of the Kansas City 'Outfit' * * * a term used in describing the organized crime element * * * " (R. 365), and that Tousa was "running the bookmaking operation for [him]" (R. 366).

The affidavit does not establish probable cause to believe that Nicholas Civella would be overheard engaging in illegal conversations over the target telephone. Absent a belief that conversations of Nicholas Civella would be overheard, naming him in the interception application is not required, 18 U.S.C. 2518(1)(b)(iv), and the failure to name him does not justify suppression. *United States* v. *Bernstein*, 509 F. 2d 996, 1001 (C.A. 4), certiorari pending, No. 74-1486. *United States* v. *Martinez*, 498

[7] Ouseley's affidavit was submitted to the district court in the January 7, 1970, *ex parte* proceeding in which the government sought orders authorizing the use of a pen register and a telephone interception. See *infra* pp. 9-11.

F. 2d 464, 468 (C.A. 6); *United States* v. *Russo*, 527 F. 2d 1051 (C.A. 10), certiorari denied June 1, 1976, No. 75-1218.

c. Although we do not dispute the court of appeals' conclusion that the government had probable cause to name Anthony Civella in the intercept application, the court also correctly held that the failure to name him does not justify suppression in the absence of any showing of prejudice resulting from the omission.[8] See also *United States* v. *Doolittle*, 507 F. 2d 1368 adhered to in rehearing *en banc* 518 F. 2d 500 (C.A. 5), petition for a writ of certiorari pending, No. 75-513. But whether this holding is correct will be determined by this Court in *Donovan*, and the result of that case will control the disposition of petitioner Anthony Civella's claim. If this Court resolves the naming issue in *Donovan* in the government's favor, the decision below is correct and the petition should be denied. On the other hand, should the Court sustain the *Donovan* court of appeals on this issue, the intercept evidence against Anthony Civella should have been suppressed, and the petition should be granted with respect to him and his case remanded to the court of appeals.

3. Section 2518(1)(b) requires that an interception application contain "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued * * * ." In the government's application here, Special Attorney David Martin of the Department of Justice stated that he based his knowledge upon an affidavit of FBI Agent Spencer Hellekson, a copy of which

[8] The fact that he received inventory notice precludes such a showing.

was supposedly attached to the application. In fact, no such affidavit was attached; instead, at the *ex parte* hearing at which Judge Collinson approved this application and one to install a pen register (see note 7, *supra*), FBI Agent William Ouseley was present and submitted an affidavit in support of the government's applications.

The explanation for these events is fairly summarized by the court below:

> The record makes it clear that at least two Special Agents of the FBI were concerned in the investigation. One of them was Mr. Hellekson, and the other was Special Agent William N. Ouseley. The original affidavit in support of the application was prepared and signed by Hellekson and was mentioned in the application that was prepared at about the same time. However, when the Hellekson affidavit was considered in the Department of Justice it was found to be insufficient in content. A new affidavit was then prepared and executed by Ouseley, and that was the affidavit that was ultimately submitted to and considered by Judge Collinson on January 7, 1970. The whole problem arises from the fact that Mr. Martin simply failed to change his original application that mentioned the Hellekson affidavit. [Pet. App. A-10 to A-11].

Since Judge Collinson read and considered Agent Ouseley's affidavit during the hearing on the government's interception application (Pet. 18-19), he was presented with a full statement of the facts upon which attorney Martin relied in requesting interception orders and the requirements of Title III were satisified. As the court of appeals correctly observed, any error was essentially clerical:

> [it] did not influence Judge Collinson or anyone else in concluding that wiretap authority should be granted, and it did not prejudice the defendants. Therefore, it can be ignored. *Cf. United States* v. *Chavez*, *supra*, 416 U.S. at 573-80; *United States* v. *Schaefer*, 510 F. 2d 1307, 1310 (8th Cir.), *cert. denied*, 421 U.S. 975 (1975); *United States* v. *Thomas*, 508 F. 2d 1200, 1203 (8th Cir.), *cert denied*, 421 U.S. 947 (1975); *United States* v. *John*, *supra*, 508 F. 2d at 1137; *United States* v. *Brick*, 502 F. 2d 219, 222-23 (8th Cir. 1974). [Pet. App. A-10].

CONCLUSION

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied with respect to petitioners Frank Tousa and Nicholas Civella, and that action on the petition with respect to Anthony Civella should be deferred pending this Court's disposition of *United States* v. *Donovan*, No. 75-212.

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